

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2009 Session

STATE OF TENNESSEE v. JEFFREY BERNARD STRATTON, JR.

**Direct Appeal from the Circuit Court for Coffee County
No. 36,412 Charles Lee, Judge**

No. M2009-00349-CCA-R3-CD - Filed December 22, 2009

A Coffee County jury convicted the Defendant, Jeffrey Bernard Stratton, of driving under the influence (“DUI”) and DUI per se. The trial court merged the convictions. The Defendant appeals, arguing that the evidence is insufficient to support his convictions and that the trial court’s sentence is excessive. After a thorough review of the record and the applicable law, we affirm the trial court’s judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Norris A. Kessler, III, Winchester, Tennessee, for the Appellant, Jeffrey Bernard Stratton, Jr..

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Cameron L. Hyder Assistant Attorney General; C. Michael Layne, District Attorney General; Marla Holloway Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This cases arises from the Defendant’s May 17, 2007, DUI arrest. The Defendant was indicted for DUI, DUI per se, and a violation of the light law.¹ At the Defendant’s trial, the following evidence was presented: Trooper Charlie Harris, with the State of Tennessee Department of Safety Highway Patrol, testified that on May 17, 2007, he was working a midnight shift, from 8:00 p.m. to 6:00 a.m. Trooper Harris recalled that, shortly after midnight, he was patrolling along Interstate Drive, which is a heavily traveled public road due to its location and connection to other highways. Trooper Harris noticed a black Chevrolet Cavalier because some of its rear lights were not on. Trooper Harris began

¹ The light law violation was later dismissed.

spacing the vehicle and determined the vehicle was traveling twenty miles per hour over the posted speed limit. Trooper Harris decided to make a traffic stop to investigate further. Trooper Harris recalled that the driver made a lawful stop, but the officer noted the driver's reaction time appeared to be a little slow. The officer further noted that the driver chose to stop in an area that caused both the driver's and the officer's vehicles to stop in a lane of travel.

Trooper Harris testified that he approached the driver's side of the vehicle and, while standing about two to three feet from the window, smelled a strong odor of alcohol. The Defendant was seated in the driver's seat and three other passengers were in the vehicle. Trooper Harris asked the Defendant whether he had been drinking, and the Defendant admitted he drank "a couple" of beers earlier, but said he stopped drinking because he was the designated driver. Trooper Harris said the Defendant's speech was "stern vocal," meaning that the Defendant seemed to be focused on his words, picking and choosing his words carefully. Trooper Harris further described "stern vocal" as authoritative but not impolite. Based on Trooper Harris's experience, this type of speech can be an indicator of impairment. Trooper Harris also observed both the Defendant's body language and the Defendant's hesitancy and determined to go further with the investigation by requesting the Defendant perform field sobriety tests.

Trooper Harris testified that the Defendant was "a little" unsteady as he exited the vehicle to perform the field sobriety tests. He recalled that the Defendant was polite and cooperative throughout the whole incident. Trooper Harris administered the following three field sobriety tests: the walk and turn, a one-leg stand, and the finger-to-nose test. After giving the Defendant instructions on how to perform each test, Trooper Harris asked the Defendant if he understood the directions and if he had any type of injury that would prohibit him from performing the tests. The Defendant stated that he understood the instructions and that he did not have an injury that would prevent him from performing the tests. On the walk and turn test, the Defendant exhibited six clues out of the eight possible clues, with only two required to indicate the subject is over the presumptive level of .08. The Defendant then performed the one-leg stand and both swayed and placed his foot down earlier than instructed. Finally, on the finger-to-nose test, the Defendant failed to touch his nose with his finger every time he was instructed to do so. Because the Defendant showed indicators for impairment on all three field sobriety tests, Trooper Harris asked the Defendant to take a breathalyzer test to determine the content of the alcohol in his blood. The Defendant was placed under arrest for DUI and taken to the county sheriff's department where he agreed to take the breathalyzer test.

Trooper Harris testified that based upon his training, certification, and experience he formed the opinion that the Defendant was impaired and unable to safely operate a motor vehicle. He recounted a variety of contributing factors he considered in making that decision, including the Defendant's speed while driving, the fact that some of the vehicle's rear lights were off, the odor of alcohol, the Defendant's admission of drinking alcohol, the Defendant's watery and bloodshot eyes, and the Defendant's performance on the field sobriety tests.

Angie Cossey testified she was working as a corrections officer on May 18, 2007. She further testified that on that date her name was Angie Woods. Cossey testified that she conducted a

breathalyzer test on the Defendant in the booking area of the sheriff's department and that the result was .13. Cossey recalled that the Defendant was surprised at the results and said, "I was trying to make it home."

The Defendant testified that he worked on May 17, 2007, as an emergency medical technician for Rural/Metro Ambulance Service in Franklin County. On his way home from work, at approximately 7:00 p.m., a friend called to invite the Defendant to join a group at a local bar. The Defendant recalled he and three other friends arrived at the bar around 9:00 p.m., and he ordered a beer and appetizers. The Defendant drank and ate appetizers and then ordered and finished a second beer at approximately 10:15 p.m. At this point in the evening, the Defendant was asked to be the designated driver, so the Defendant stopped drinking and ordered dinner. The group remained at the bar until around midnight. The Defendant explained that he did not drive his car to the bar, so when they left he was driving an unfamiliar vehicle. The Defendant recalled making sure the car lights were on before pulling onto Interstate Drive. Right after the Defendant pulled onto Interstate Drive, he noticed Trooper Harris driving behind him. The Defendant stated that he was driving forty miles per hour at the time and did not think it was possible, based on the distance Trooper Harris followed the Defendant, for Trooper Harris to accurately pace the Defendant's speed.

The Defendant testified that Trooper Harris turned on his blue lights, and the Defendant pulled over. The Defendant gave Trooper Harris his driver's license, and, after Trooper Harris stated that he smelled alcohol, the Defendant admitted he had two beers. The Defendant further testified that the three other people in the vehicle were intoxicated and, thus, the source of the odor of alcohol. The Defendant exited his vehicle and performed the field sobriety tests. The Defendant testified that he thought he "did very well" on the walk and turn test. The Defendant acknowledged that on the one-leg stand he swayed, but attributed his lack of balance to his weighing 350 pounds and previous injuries to both legs, about which he failed to tell Trooper Harris because he was nervous. Based upon his weight and previous injuries, the Defendant thought he performed this test well even though he put his foot down earlier than instructed. As to the final test, the Defendant recalled that he touched his nose every time he was instructed to do so. The Defendant stated he was arrested after he completed the field sobriety tests.

The Defendant testified that he did not recall Trooper Harris's presence in the booking room when he took the breathalyzer test. He stated that he remembered Ms. Cossey and a young boy being in the room. The Defendant stated that he was very surprised when he saw the results of the breathalyzer test. He knew that he was not intoxicated and thought the machine had to be wrong. Regardless of the breathalyzer test results, the Defendant contended that his ability to operate a vehicle was not impaired and that he was sober at the time he was driving.

In response to Trooper Harris's comments regarding the Defendant's speech as "stern vocal," the Defendant explained that he was raised to show respect to authority and thus was responding "yes, sir" and "no, sir" to the officer.

On cross-examination, the Defendant acknowledged that Officer Harris treated him with

respect. The Defendant consistently asserted that Officer Harris was mistaken on the indicators of impairment about which Officer Harris had testified previously. The Defendant testified that he had never seen Trooper Harris before this incident.

The jury found the Defendant guilty under both theories of driving under the influence. The trial court merged the convictions and sentenced the Defendant to serve thirty days in jail with the remainder of the eleven month twenty-nine day sentence on probation. The Defendant now appeals from this judgment.

II. Analysis

On appeal, the Defendant argues that there is insufficient evidence to prove the Defendant was driving under the influence of an intoxicant. The Defendant further argues that the trial court's sentence of thirty days of incarceration is excessive. The State contends that the evidence is sufficient because the record established that the Defendant performed poorly on the field sobriety tests and took a breathalyzer test with a .13 result. The State asserts that the trial court correctly sentenced the Defendant.

A. Sufficiency of the Evidence

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum

alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

In this case, a conviction for DUI requires proof beyond a reasonable doubt that the defendant: (1) either drove or was in physical control of a motor driven vehicle; (2) on any public road or premise frequented by the public; (3) while under the influence of an intoxicant; or (4) with an alcohol concentration in the defendant's blood or breath be .08 or more. *See* T.C.A. § 55-10-401 (2006).

The evidence, considered in the light most favorable to the State, proves that the Defendant pulled onto a public road with the vehicle's rear lights off. Trooper Harris noticed the vehicle without the rear lights and began pacing him and determined the Defendant was driving twenty miles per hour over the speed limit. After pulling the vehicle over and approaching the Defendant, Trooper Harris noticed the strong odor of alcohol and the Defendant's "stern vocal" speech. The Defendant admitted to drinking alcohol earlier in the evening. The Defendant showed indicators of impairment on all three field sobriety tests, and his breathalyzer test registered .13, well above the legal limit of .08.

The Defendant's admission of drinking, odor of alcohol about his person, watery and blood shot eyes, speech, and results of both the field sobriety tests and the breathalyzer test indicate the Defendant was driving while under the influence of an intoxicant and the alcohol concentration in his breath was .08 or more. The Defendant's contention that the Trooper is merely "mistaken" goes against the weight of the evidence that the Defendant was indeed intoxicated. Accordingly, we conclude that sufficient evidence was presented for the jury to find the Defendant guilty beyond a reasonable doubt of DUI. As such, the Defendant is not entitled to relief on this issue.

B. Sentencing

The Defendant contends that the trial court's imposition of a thirty-day period of incarceration for a first offense DUI is excessive. The State responds that the trial court correctly considered mitigating and enhancement factors and found that the Defendant did not accept responsibility for the crime until forced to do so, and found the confinement necessary to provide a general deterrence due to the high number of alcohol-related cases in Coffee County.

Misdemeanor sentences must be specific and in accordance with the principles, purposes, and goals of the Criminal Sentencing Reform Act. T.C.A. §§ 40-35-104, -302 (2006); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). We review misdemeanor sentencing with a presumption of correctness. T.C.A. § 40-35-401(d) (2006). “[T]he presumption of correctness . . . is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm’n Cmts (2006).

The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. T.C.A. § 40-35-302. Generally, the percentage set should not be greater than seventy-five percent of the sentence for the misdemeanor offender. *Palmer*, 902 S.W.2d at 393-94. The misdemeanor sentencing statute requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served “in actual confinement” prior to “consideration for work release, furlough, trusty status and related rehabilitative programs.” T.C.A. § 40-35-302(d) (2006); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998).

A convicted misdemeanant has no presumption of entitlement to a minimum sentence, and trial courts are afforded considerable latitude in misdemeanor sentencing. *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999); *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Given the latitude afforded to trial courts in misdemeanor sentencing, we defer to the trial court’s judgment in this case because the record reflects a basis, within the contours of the sentencing law, for requiring confinement. The trial court considered both mitigating and enhancement factors prior to the imposition of the sentence. The trial court acknowledged the mitigating factors in this case, such as the Defendant’s good work record and work ethic, no prior offenses, and a supportive family. The trial court also considered the Defendant’s lack of remorse and the need for general deterrence of alcohol-related offenses in Coffee County. In addressing the issue of general deterrence, the trial court found the following:

If the number of cases that are tried in the Circuit Court is any indication of a problem in Coffee County, there obviously is a problem. I can take judicial notice of those cases which I personally have tried since I have been in Coffee County, and I think alcohol-related offenses, of those I have tried since I came here in March, constitute at least half of all offenses that this Court has heard. Now if the number of cases that are on this Court’s docket is an indication of the problem, you have a very serious problem. Consequently, the Court has to take into consideration how is it that this problem can be dealt with, and general deterrence is a factor which the Court must consider.

Accordingly, because the record supports the trial court's determination, we affirm the sentence imposed by the trial court. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that sufficient evidence was presented for a jury to find the Defendant guilty of DUI and DUI per se, and that the trial court correctly sentenced the Defendant. As such, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE